U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0115 BLA

RUSSELL DAUGHERTY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	DATE ISSUED: 11/18/2016
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Request for Modification of Larry A. Temin, Administrative Law Judge, United States Department of Labor.

Russell Daugherty, Grundy, Virginia, *pro se*.

Andrea Berg and Ashley M. Harmon (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Request for Modification (2012-BLA-5160) of Administrative Law Judge Larry A. Temin rendered on a subsequent claim filed pursuant to the provisions of the Black

Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). This case involves claimant's request for modification of the denial of benefits in his fourth claim, filed on November 25, 2008.[1]

The procedural history of this claim is as follows: Adjudicating the claim pursuant to 20 C.F.R. Parts 718 and 725, Administrative Law Judge Linda S. Chapman credited claimant with 10.44 years of coal mine employment, but found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and denied benefits in a Decision and Order issued on September 28, 2010. Director's Exhibit 51. On November 2, 2010, claimant submitted new evidence and requested modification of Judge Chapman's denial of benefits pursuant to 20 C.F.R. §725.310. Director's Exhibit 52. The case was assigned to Administrative Law Judge Richard Stansell-Gamm, who conducted a formal hearing on February 26, 2014, but retired before rendering a decision. The case was reassigned to Administrative Law Judge Larry A. Temin (the administrative law judge), who credited claimant with 12.58 years of coal mine employment and found that, because claimant established less than fifteen years of coal mine employment, claimant was unable to invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] After reviewing the evidence developed since the denial of the prior claim, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.107, or a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[3] Accordingly, the

[1] Claimant filed three prior claims. Claimant's most recent prior claim, filed on September 8, 2003, was denied by the district director because claimant failed to establish the existence of pneumoconiosis or that his total disability was due to pneumoconiosis. Director's Exhibit 39. Claimant requested modification on April 12, 2005, and by Decision and Order dated December 18, 2006, Administrative Law Judge Daniel Solomon denied modification. Director's Exhibits 2, 44. Claimant took no further action until the filing of his current claim. Director's Exhibit 4.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment are established. 30 U.S.C §921(c)(4) (2012); 20 C.F.R §718.305.

[3] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed

administrative law judge found that claimant failed to establish a basis for modification pursuant to 20 C.F.R. §725.310, and denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc). Additionally, because this case involves a request for modification of the denial of a subsequent claim, the administrative law judge was required to consider whether the

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since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309; *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c). Because claimant's prior claim was denied for failure to establish the existence of pneumoconiosis or disability causation, claimant had to submit new evidence establishing either of these conditions of entitlement in order to obtain review of the merits of his claim. *See* 20 C.F.R. §725.309; *White*, 23 BLR at 1-3.

[4] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant's last coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

evidence developed in the subsequent claim, considered in conjunction with the evidence submitted with the request for modification, establishes a change in conditions or a mistake in a determination of fact with regard to the prior denial of claimant's subsequent claim. *See* 20 C.F.R. §725.310; *Keating v. Director, OWCP*, 71 F.3d 1118, 1123, 20 BLR 2-53, 2-62-3 (3d Cir. 1995); *Jessee v. Director, OWCP*, 5 F.3d 723, 724-5, 18 BLR 2-26, 2-28 (4th Cir. 1993).

LENGTH OF COAL MINE EMPLOYMENT

Because the administrative law judge's determination of claimant's length of coal mine employment is relevant to whether claimant can invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis, we will review the administrative law judge's finding that claimant worked 12.58 years in underground coal mine employment.

Claimant bears the burden of establishing the length of his coal mine employment. *See Kephart v. Director, OWCP*, 8 BLR 1-185 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984). Because the Act fails to provide any specific guidelines for the computation of time spent in coal mine employment, the Board will uphold the administrative law judge's determination if it is based on a reasonable method or methods and is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *Smith v. National Mines Corp.*, 7 BLR 1-803 (1985); *Miller v. Director, OWCP*, 7 BLR 1-693 (1983); *Maggard v. Director, OWCP*, 6 BLR 1-285 (1983).

In determining the total length of claimant's coal mine employment, the administrative law judge considered all relevant evidence, consisting of claimant's employment history summaries, his Social Security Administration (SSA) earnings records, and the hearing testimony. Decision and Order on Modification at 5-7; Director's Exhibits 5-7; Hearing Transcript at 16-26. While claimant alleged sixteen years of underground coal mine employment and indicated that he worked at some coal mines that were not listed in his SSA earnings records, the administrative law judge determined that claimant did not explicitly identify any such mines. Decision and Order on Modification at 6. Consequently, the administrative law judge rationally found that claimant's hearing testimony failed to affirmatively establish at least fifteen years of coal mine employment, and that the SSA earnings records constituted the most reliable evidence of claimant's employment. *Id.*; *see Clayton v. Pyro Mining Co.*, 7 BLR 1-551 (1984).

The administrative law judge determined that claimant's SSA earnings records showed coal mine employment earnings between 1964 and 1982. Decision and Order on Modification at 6; Director's Exhibit 7. For the period between 1964 and 1977, the administrative law judge credited claimant with forty quarters of coal mine employment, during which claimant earned at least $50.00 per quarter with various coal mine companies, for a total of ten years of qualifying coal mine employment. Decision and Order on Modification at 6. For the years after 1977, when SSA only reported annual earnings, rather than quarterly earnings, the administrative law judge referenced the formula set forth at 20 C.F.R. §725.101(a)(32)(iii).[5] The administrative law judge determined that claimant was continuously employed by Island Creek Coal Company in 1981, noting that the SSA earnings records did not show any other employment during that year and that claimant's earnings of $20,874.73 exceeded the coal mine industry's average earnings for 1981, as set forth in Exhibit 610[6] of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual*. Decision and Order on Modification at 7; Exhibit A. Thus, the administrative law judge credited claimant with one year of coal mine employment in 1981. *Id*. For the years 1978, 1980, and 1982, the administrative law judge determined that the evidence was insufficient to establish the beginning and ending dates of the miner's employment with multiple employers, and compared the miner's yearly earnings with the SSA wage base table set forth in Exhibit 609[7] to the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure*

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[5] The regulation at 20 C.F.R. §725.101(a)(32)(iii) provides, in pertinent part:

> If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS).

20 C.F.R. §725.101(a)(32)(iii).

[6] Exhibit 610 to the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual*, entitled "*Average Wage Base*," contains the coal mine industry daily earnings data referenced in 20 C.F.R. §725.101(a)(32)(iii).

[7] Exhibit 609 sets out the annual limit on income subject to Social Security tax. The Social Security earnings records may underreport a miner's actual wages because the earnings records do not typically show income that exceeds the wage base amount.

Manual. Decision and Order on Modification at 7; Exhibit B. Finding that claimant's coal mine earnings did not exceed the SSA wage base amount for any of those years, the administrative law judge divided claimant's earnings by the wage base amount for each year and, based on his calculations, credited claimant with a combined total of 1.58 years of coal mine employment for the years 1978, 1980, and 1982. *Id.* The administrative law judge concluded that claimant established 12.58 years of qualifying coal mine employment and, therefore, could not invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis.

For coal mine employment performed prior to 1978, the Board has held that an administrative law judge permissibly may credit a miner for each calendar quarter in which $50.00 was earned. *See Tackett v. Director,* OWCP, 6 BLR 1-839 (1984). In the present case, the administrative law judge's calculation of forty quarters of coal mine employment included ten extra quarters by failing to consider that some amounts were earned in the same quarter, as reported in the SSA earnings records for the years 1965, 1966, 1968, 1969 and 1971.[8] Further, while the administrative law judge permissibly credited claimant with a full year of coal mine employment in 1981, as he found that claimant was continuously employed by Island Creek Coal Company with earnings

[8] The administrative law judge over-counted the claimant's work record by considering only the amounts earned, rather than recognizing the SSA reported quarters of earnings. The record reflects that in the third quarter of 1965, claimant earned $373.20 at Brier Branch Coal Company (Brier Branch), $479.00 at David Smith Coal Company, and $76.80 at North Hill Coal Company, and the administrative law judge credited claimant with three quarters of coal mine employment. Decision and Order on Modification at 6; Director's Exhibit 7. In the fourth quarter of 1965, claimant earned $171.20 at Brier Branch and $460.90 at H & E Coal Company (H & E), and was credited with two quarters of employment. *Id.* In the second quarter of 1966, claimant earned $228.80 at H & E, $265.00 at Conn Coal Company (Conn), and $84.00 at Bobby Dotson Coal Company, and was credited with three quarters of employment. *Id.* In the fourth quarter of 1966, claimant earned $127.00 at Conn and $297.00 at Charlie Hurley Coal Company, and was credited with two quarters of employment. *Id.* In the third quarter of 1968, claimant earned $169.00 at H & E and $576.00 at William Smith Coal Company (William Smith), and was credited with two quarters of employment. *Id.* In the fourth quarter of 1968, claimant earned $483.50 at William Smith and $748.53 at Black Watch Coal Corporation (Black Watch), and was credited with two quarters of employment. *Id.* In the first quarter of 1969, claimant earned $339.20 at William Smith and $482.06 at Black Watch, and was credited with two quarters of employment. *Id.* Lastly, in the third quarter of 1971, claimant earned $484.34 at Jewell Ridge Coal Corporation and $217.00 at Little Bear Coal Company, and was credited with two quarters of employment. *Id.*

exceeding those set forth in the table at Exhibit 610, he erred in using the table at Exhibit 609, containing a wage base that is not specific to the coal mine industry, for the years 1978, 1980, and 1982. A remand is not required, however, as the administrative law judge's miscalculations are not prejudicial to claimant. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-92 (1988). Even assuming *arguendo* that claimant is credited with ten years of qualifying employment in the years prior to 1978, and with a full year of qualifying employment in each of the years 1978, 1980, 1981 and 1982, claimant would have, at most, fourteen years of coal mine employment. Because substantial evidence supports the administrative law judge's ultimate finding of more than ten, but less than fifteen, years of qualifying coal mine employment, we affirm his determination that claimant could not invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis. 20 C.F.R. §718.305(b).

MERITS OF ENTITLEMENT

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the administrative law judge's decision is supported by substantial evidence, consistent with applicable law, and must be affirmed. Pursuant to Section 718.202(a)(1), the administrative law judge considered four interpretations of two x-rays dated March 10, 2009 and December 16, 2009 that were submitted in support of this subsequent claim, and two interpretations of an August 3, 2013 x-ray submitted with claimant's request for modification. Decision and Order on Modification at 7-8, 20. The administrative law judge properly found that all four interpretations of the March 10, 2009 and December 16, 2009 x-rays were negative for pneumoconiosis. Decision and Order on Modification at 20; Director's Exhibits 11, 15, 41. The administrative law judge further determined that the August 3, 2013 x-ray was interpreted as positive for pneumoconiosis by Dr. Alexander and as negative by Dr. Wolfe, and that both physicians are Board-certified radiologists and B readers. Claimant's Exhibit 1; Employer's Exhibit 3. Because he concluded that equally-qualified readers interpreted the August 3, 2013 x-ray as both positive and negative for the existence of pneumoconiosis, the administrative law judge rationally deemed this x-ray "to be inconclusive." Decision and Order on Modification at 20. The administrative law judge additionally found that the x-rays contained in claimant's newly submitted treatment records did not indicate whether pneumoconiosis was present. Decision and Order on Modification at 9, 21, 27; Director's Exhibit 41; Claimant's Exhibit 2.

Having found that the March 10, 2009 and December 16, 2009 x-rays were negative for pneumoconiosis and that the August 3, 2013 x-ray was inconclusive, the administrative law judge reasonably concluded that claimant failed to establish the existence of pneumoconiosis by a preponderance of the x-ray evidence. As substantial evidence supports the administrative law judge's findings at Section 718.202(a)(1), they

are affirmed. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *Adkins v. Director, OWCP*, 958 F.2d 49, 52-53, 16 BLR 2-61, 2-66 (4th Cir. 1992).

At Section 718.107, the administrative law judge determined that no party designated a CT scan as affirmative evidence, but noted that claimant's treatment records contained a CT scan administered on October 25, 2011 that did not address the presence or absence of pneumoconiosis. Decision and Order on Modification at 22; Claimant's Exhibit 2. As Drs. Tuteur and Fino reviewed the report of this CT scan and testified at deposition that it identified no abnormalities consistent with clinical pneumoconiosis, the administrative law judge rationally concluded that the CT scan evidence was negative for pneumoconiosis at Section 718.107. Decision and Order on Modification at 21-22; Employer's Exhibit 9 at 11-12; Employer's Exhibit 10 at 15-16. As substantial evidence supports the administrative law judge's finding, it is affirmed.

Likewise, we affirm the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2), as the record contains no biopsy or autopsy evidence. Decision and Order on Modification at 21. Further, claimant cannot establish the existence of pneumoconiosis pursuant to Section 718.202(a)(3), as the record contains no evidence of complicated pneumoconiosis, *see* 20 C.F.R. §718.304, and claimant failed to establish fifteen years of underground coal mine employment, *see* 20 C.F.R. §718.305.

At Section 718.202(a)(4), the administrative law judge reviewed the medical opinions of Drs. Wooten, Agarwal, Fino, Tuteur, and Castle, and the opinion of Ms. Compton, claimant's "treating family nurse practitioner," and determined that only Ms. Compton and Dr. Wooten diagnosed clinical pneumoconiosis. Decision and Order on Modification at 9-13, 23-28; Director's Exhibits 11, 14; Claimant's Exhibits 1, 2; Employer's Exhibits 1, 4, 6, 8-10. The administrative law judge permissibly discounted Ms. Compton's diagnosis of clinical pneumoconiosis on the grounds that she lacked the medical qualifications to render such a diagnosis and failed to indicate the documentation upon which she relied to support her conclusion. Decision and Order on Modification at 23; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 537, 21 BLR 2-323, 2-341 (4th Cir. 1998); *York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766, 1-770 (1985). The administrative law judge also rationally discounted Dr. Wooten's diagnosis of clinical pneumoconiosis, as it was based on Dr. Alexander's positive x-ray reading and the administrative law judge found that the weight of the x-ray and CT scan evidence was negative for

pneumoconiosis.[9] Decision and Order on Modification at 24, 27; Claimant's Exhibit 1; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

With respect to the issue of legal pneumoconiosis, the administrative law judge determined that Drs. Wooten and Agarwal[10] diagnosed legal pneumoconiosis, Directors' Exhibits 11, 14, Claimant's Exhibit 1, whereas Drs. Castle, Fino and Tuteur concluded that claimant does not have legal pneumoconiosis. Drs. Castle and Fino attributed claimant's disabling obstructive pulmonary impairment to non-occupational asthma and gastroesophageal reflux disease (GERD), and Dr. Tuteur attributed claimant's "asthma-like" condition to chronic incompletely-treated GERD. Director's Exhibit 41; Employer's Exhibits 1, 4, 9, 10. The administrative law judge determined that all of the physicians were well-qualified to render opinions in this case, but he identified deficiencies in the opinions of Drs. Wooten and Agarwal that detracted from their reliability. Decision and Order on Modification at 24, 26. The administrative law judge recognized that while Drs. Wooten and Agarwal administered objective tests in conjunction with their physical examinations of claimant, their diagnoses of legal pneumoconiosis were based on limited information, as neither physician reviewed any additional diagnostic studies. Decision and Order on Modification at 24; *see Sabett v. Director, OWCP*, 7 BLR 1 -299 (1984). The administrative law judge further found that the conclusions of Drs. Wooten and Agarwal were undermined because neither physician addressed whether claimant's GERD contributed to his pulmonary condition. *See Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986). The administrative law judge also determined that Dr. Wooten's reliance on claimant's self-reported symptoms of "daily

[9] On August 3, 2013, Dr. Wooten examined claimant, conducted objective tests, and diagnosed "clinical pneumoconiosis based upon the chest x-ray B read with small opacities in both upper and right middle lung zones with a profusion of 1/0." Claimant's Exhibit 1. Dr. Wooten also diagnosed legal pneumoconiosis "based upon at least a 12 year history in coal mine employment associated with symptoms of progressive shortness of breath with exertion, exercise intolerance, daily cough, sputum production, ankle edema, and orthopnea with findings of severe chronic obstructive pulmonary disease." *Id*.

[10] After conducting a complete pulmonary evaluation on March 10, 2009, Dr. Agarwal diagnosed legal pneumoconiosis, noting a coal mine employment history of sixteen to eighteen years and suggesting further evaluation for the possibility of asthma in view of claimant's post-bronchodilation reversibility on pulmonary function studies. Director's Exhibit 11. During his deposition held on June 5, 2009, Dr. Agarwal testified that claimant's condition is consistent with either legal pneumoconiosis or non-occupational asthma, and stated that he could not distinguish between these two conditions absent a trial of inhaled or oral corticosteroids. Director's Exhibit 14.

cough, progressive shortness of breath with exertion, and orthopnea" found no support in claimant's treatment records for the period from March to September 2012. Decision and Order on Modification at 24; Claimant's Exhibit 2. Additionally, the administrative law judge noted that Dr. Agarwal's diagnosis was equivocal, as the physician indicated that claimant's condition is consistent with either legal pneumoconiosis or non-occupational asthma, and that he could not differentiate between the two without a trial of inhaled or oral corticosteroids. Decision and Order on Modification at 23-24; Director's Exhibits 11, 14 at 21-23; *see Justice*, 11 BLR at 1-94. Hence, the administrative law judge permissibly found that the opinions of Drs. Wooten and Agarwal were insufficiently documented and reasoned, and were entitled to less weight. Decision and Order on Modification at 24, 27; *see Moseley v. Peabody Coal Co.*, 769 F.2d 357, 8 BLR 2-22 (6th Cir. 1985); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

By contrast, the administrative law judge rationally accorded greater weight to the contrary opinions of Drs. Castle, Fino, and Tuteur, that claimant has asthma and/or GERD unrelated to coal dust exposure, as he found that they were based upon, and better supported by, more extensive medical documentation. Decision and Order on Modification at 26; *see Sabett*, 7 BLR at 1-301 n.1; *see also King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985). The administrative law judge noted that these physicians stressed that the marked variability in claimant's pre-bronchodilator pulmonary function studies and the significant improvement with bronchodilation were consistent with asthma, but inconsistent with a progressive and irreversible disease. Decision and Order on Modification at 25-27; Director's Exhibits 41, 48; Employer's Exhibits 1, 4, 6, 8, 9, 10. Further, although claimant denied that he had been diagnosed with asthma, the administrative law judge referenced 1986 hospital records documenting an attack of acute asthma and diagnosing "chronic obstructive pulmonary disease – asthma." Decision and Order on Modification at 27, *quoting* Director's Exhibit 24, item 12. The administrative law judge ultimately concluded that the opinions of Drs. Castle, Fino, and Tuteur, were more persuasive and better reasoned that the opinions of Drs. Wooten and Agarwal. Decision and Order on Modification at 27-28. As substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that claimant failed to establish legal pneumoconiosis pursuant to Section 718.202(a)(4).

Because the administrative law judge properly found that the newly submitted evidence was insufficient to establish the existence of clinical and legal pneumoconiosis pursuant to Section 718.202(a), we affirm his finding that claimant failed to demonstrate a change in an applicable condition of entitlement since the denial of the prior claim pursuant to Section 725.309, or a basis for modification pursuant to Section 725.310. Decision and Order on Modification at 28. Consequently, we affirm the administrative law judge's denial of benefits.

Accordingly, the Decision and Order Denying Request for Modification of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge